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33

THE EUROPEAN COURT OF JUSTICE AS A GAME-CHANGER

Fiduciary obligations in the area of freedom, security and justice

Ester Herlin-Karnell

Introduction

There are few areas in EU integration law and policy in which the Court of Justice of the European Union ('the EU Court') has not played a major role as a vehicle of integration, and the Area of Freedom, Security and Justice (AFSJ) is no exception. One could even go so far as to say that the AFSJ represents a field of law in which the EU Court has been a particularly important player and in which the judicial process has helped constitutionalize and transform this area into a central EU integration site.

The European mission of establishing an AFSJ is an interesting case study on the activity of the EU Court in its endeavors to construct a policy framework with legal implications across twenty-eight member states (alas, the United Kingdom is about to leave through its Brexit negotiations). In the same way as the Court was a central player in mainstreaming the former third pillar, it continues to remain at the very apex of this development (Fichera 2016). With the Treaty of Maastricht era starting in 1993, the famous 'third pillar' was established, which created a European system of criminal law cooperation as well as civil law cooperation, and asylum and immigration law. The Treaty of Amsterdam of 1999 clarified the EU's objectives with regard to the fight against crime and the concept of an AFSJ was generated. While asylum matters, immigration and civil law cooperation were moved to Title IV of the former EC Treaty, criminal law cooperation and security remained the hallmark of the third-pillar regime under the Amsterdam Treaty (Peers 2015). However, as is often pointed out, the third pillar to a large extent excluded the Court of Justice from policing this area as its jurisdiction was based on a voluntary declaration of the member states. From a EU law perspective, this was a prime example of judicial deficit and lack of oversight, which was remedied with the Treaty of Lisbon.

The AFSJ is a very broadly defined field of law dealing with a EU-wide policy area that ranges from security and criminal law to border control and civil law cooperation. However, the third pillar allowed for limited involvement by the European Parliament in the legislative process, and was criticized for having a democratic deficit and for a lack of transparency. The Treaty of Lisbon has now recast this whole framework by incorporating the AFSJ *acquis* into the Treaty of the Functioning of the European Union (TFEU). One of the most significant changes introduced by the Lisbon Treaty was the extension of the Court's jurisdiction to cover

also the former third-pillar area (Lenaerts 2010; Lenaerts and Gutiérrez-Fons 2016; Hinarejos 2009). Thus, the Lisbon Treaty stipulates in Article 267 TFEU that (summarized):

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. *If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.*¹

(Emphasis added)

Hence, this chapter will focus on what I consider to be the most important judicial developments in AFSJ law and the role played by the Court of Justice in this European process, and as a ‘game-changer’ in this area of former third-pillar law. The specific focus of this chapter is the role of the Court as a guardian of constitutional rights and as an integrationist court. The chapter is structured as follows. The next section charts the trajectory of the AFSJ and the function of the Court in this story. In the following I focus on the tactics of mutual recognition and how this has been a particularly successful method in the AFSJ as an expression of negative integration through the Court’s case law. In doing so, I will zoom in on a number of pertinent cases for the development of, in particular, EU criminal law and EU asylum law. Thereafter, I will discuss the relationship between the EU Court of Justice and other courts. Finally, I will tentatively ask to what degree the Court is acting as a trustee court for establishing and maintaining the AFSJ and streamlining it with the Charter of Fundamental Rights.

The Court of Justice and the AFSJ: the path to constitutionalization

This section will seek to demonstrate some of the judicial highlights of the centrality of the Court’s function as a ‘game-changer’ in this area. I will try to demonstrate the importance of the Court of Justice as a legal and political agent in the AFSJ. The outcome of the Court’s active role as an agent of integration in the AFSJ is an extension of European law, values and objectives into the national arena. This seems particularly important in the times of crises (writing in 2016), as the Schengen system with its borderless travel in Europe is under severe strain, and the increased terrorism threat as well as the migration crisis on top of the financial crisis are no easy components for the EU to deal with. The core question for the purposes of this chapter is to what extent the Court of Justice is a sufficient agent for this institutional reformation and the many challenges caused by the various crises (Ripoll Servent and Trauner 2014).

The AFSJ is rapidly expanding and becoming one of the newest policy domains in contemporary EU integration. Any discussion of the constitutional basis of an AFSJ means first examining Article 3 TEU. This sets out the EU’s mission in this area by promising that the EU will offer its citizens an AFSJ. Article 4j TFEU confirms this mission by explicitly acknowledging the EU’s competence and the fact that, in seeking to achieve such a constitutional space, the EU shares its competence with the member states. Article 67 TFEU adds to this by setting out the AFSJ objectives in further detail. Article 67 TFEU states that the Union will ‘endeavour to ensure a high level of security’ and that this is to be achieved through

measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

The Lisbon Treaty changed the institutional battleground by abolishing the complex pillar structure and extending the Court of Justice's previously constrained jurisdiction to include the former third pillar. The changes brought about by this Treaty are of great importance for the credibility of the AFSJ project, as they enhance its democratic legitimacy. All is not well, however, with AFSJ law. The problem is that the main driver in this area has, to date, evidently been preventive regulation through a strong security focus, whereas the creation of the AFSJ was closely associated with the more general promotion of EU values at the EU level. I have previously argued that the EU's ongoing fight against crime, and in particular against money laundering and the financing of terrorism, is an example of a risk-based approach in which linking effectiveness with security is problematic owing to too much emphasis being placed on preventive regulation (Herlin-Karnell 2016).

Therefore, the starting-point when discussing the influence of the Court of Justice on the development of an AFSJ is the safeguarding of the rule of law at the EU level. The Court of Justice sets, as one of its main priorities, the safeguarding of this principle. The rule of law is a constitutional principle of the EU, as recognized in Article 2 TEU. Central to the rule of law is the idea of bounded government retrained by law from acting outside of its powers (Kumm 2012). Therefore, given the public law nature of the AFSJ, controlling coercive power and respecting human rights, the rule of law is of crucial importance when discussing the AFSJ. It should be recalled that, in *Les Verts* (Case C-294/83), the Court of Justice stated that the community had a basic constitutional charter based on the rule of law inasmuch as neither the member states nor its institutions can avoid a review of the question of whether the measures adopted by them are in conformity with the basic constitutional charter of the Treaty. In the *Kadi* case (Case C-415/05P) concerning the right to judicial review in an asset-freezing case, the Court of Justice went further and referred to the 'constitutional principles of the EU' (Halberstam). According to the Court, the autonomous structure of EU law applies not only vis-à-vis member state law, but also vis-à-vis international law. As a consequence, no international legal obligation can alter the core principles of EU constitutional law, and the rule of law is the very backbone of the EU's constitutional structure.²

However, despite its importance as a EU constitutional axiom, the rule of law (in a formal sense) had possibly been side-tracked in the former third pillar. It could be argued that the Court stretched the boundaries of consistent interpretation in the context of criminal procedural law to an area in which the Treaty excluded it (the former third pillar). This was the case in the *Pupino* judgment (Case C-105/03), where the national court had asked the Court of Justice whether it was required to interpret Italian law in the light of a Framework Decision that enabled minors to give evidence by alternative means (for example, video conference). Framework Decisions did not have a direct effect (according to ex-Article 34 EU) and supremacy was not an established notion in the former third pillar. Nonetheless, the Court made it clear that the principle of consistent interpretation and loyalty applied to the former third pillar. In the wake of the *Pupino* case, a number of decisions were delivered, each adding to the understanding of the third pillar, and demonstrating how EU legal principles were being imported to the former third pillar as a way of fixing problems which the unsuccessful Constitutional Treaty had failed to achieve (Peers 2007).

In line with these developments, the principle of effectiveness has, in many ways, been the driving principle for the evaluation of the AFSJ, and in particular the criminal law domain. The

story of EU criminal law has been noteworthy because it has challenged the previous assumption that the EU has no legislative competence in that field. In the environmental crimes case (Case C-176/03), the Court of Justice made it clear that, when

the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

(Par. 48)

Thus, a lot of weight in this case was placed on the full effectiveness of the EU and its application in national law when asserting the EU's competence. Hence, the principle of effectiveness has been one of the most important tools for the Court when applying its reasoning. Certainly, the Court had early on insisted upon effective sanctions against breaches of EU law (the effective, proportionate and dissuasive criteria stipulated in *Greek Maize* and other cases), but in the environmental crimes case, the Court concluded that criminal law could fall within the EU sphere of competence if it was necessary for the full effectiveness of EU law. The classic principle of effectiveness is often held to stem from the more general loyalty obligation, Article 4(3) TEU (formerly Article 10 EC), and the Court has played a crucial role in shaping the contours of the effectiveness of EU law (Lang 2008). For example, the doctrines of indirect effect, state liability and supremacy are also imbued with 'effectiveness' thinking (Craig 2012). The effectiveness of EU law is part of the Court's core vocabulary and is, therefore, of no surprise in the AFSJ context.

As noted above, EU criminal law has offered a good example of how the Court set out to handle things in the absence of this Treaty and thereby set out to shape the development of the AFSJ. After all, this Treaty introduced an explicit legal basis for effective judicial protection, so use of the principle of effectiveness in the area of judicial protection is more legally settled. Article 19 TEU, which codifies the existing case law, states that member states are to provide sufficient remedies to ensure effective legal protection in the fields covered by EU law. In addition, Article 47 of the EU Charter of Fundamental Rights ('the Charter') states that everyone has the right to an effective remedy. Therefore, it seems clear that the contextualization is the important aspect here.

The extensive reach of the Court's jurisdiction was demonstrated in the famous *Kadi* cases (Case C-402/05). While in *Kadi I* the Court of Justice famously extended the jurisdiction of the EU to review, albeit indirectly, UN measures, and while this was a ground-breaking development in the context of sanctions, the adoption of the Lisbon Treaty means that the previous jurisdictional shortcomings have been resolved thanks to a specific legal basis in the Treaty (Article 75 TFEU). In *Kadi II* the Court of Justice made it clear that the reasons given by the UN for having listed Kadi as an alleged terrorist were not reasonable, since they only contained a summary of claims (C-584/10 P; C-593/10 P and C-595/10 P). The Court required a more sophisticated way of reasoning. In both *Kadi* cases the internal and external were blurred. The difficulty of distinguishing between the internal and external aspects of EU action with regard to sanctions in the fight against terrorism is reflected in the recent judgment in *European Parliament vs. Council* (Case C-130/10). In this ruling, the European Parliament challenged Council Regulation 1286/2009 amending Council Regulation 881/2002 by imposing certain specific restrictive measures directed against targeted persons and entities associated with the Al-Qaeda network. The Parliament argued that, with regard to the aim and content of the regulation, the

correct legal basis should have been Article 75 TFEU, and not Article 215 TFEU. With regard to the contested regulation, the Court of Justice made it clear that this was based on a Security Council measure and intended to preserve international peace and security, which implies that the measure at stake had a clear Common Foreign and Security Policy (CFSP) character. In addition, the Court stated in the argument that it was impossible to distinguish between the combatting of ‘internal’ terrorism on the one hand, and the combatting of ‘external’ terrorism on the other, and did not matter for the choice of the legal basis and for the scope of Article 215(2) TFEU as the legal basis of the contested regulation. The Court, therefore, stressed the political considerations behind the drafting of the Lisbon Treaty and accepted that, when choosing between legal bases, it is not just the role of the European Parliament and the increased democratic input that are the decisive factors (Case C-300/89). The Court did not specify what these critical factors entailed, but it seems reasonable to conclude that the choice of sanctions, and thereby also the legal basis, mattered at the political level as much as the effectiveness of the actual enforcement or the definition of a sanction. While the *European Parliament vs. Council* is a case which mainly concerns the dividing line between the internal and the external fight against terrorism, it is also a case which arguably highlights the choice by the legislator to fight terrorism by the means of the administrative model and not the criminal law model.

The *Kadi* cases, discussed above, offer a well-known example of how the EU places the values of EU law at the center of the discussion by stressing the importance of the autonomous legal order of the EU for the safeguarding of fundamental rights. In doing so, the Court emphasized the significance of a EU that not only respects fundamental rights, but also actively safeguards them in a legal order based on the rule of law and respect for due process rights (Murphy 2012). Hence, the *Kadi* case is an example of the Court as an agent of European values.

The Court and mutual recognition in the AFSJ

The Court of Justice has been a prominent game-changer in the AFSJ and especially in the area of mutual recognition (Lenaerts 2015). The application of mutual recognition and trust in the AFSJ raises familiar questions about the implications of free movement within the area of EU criminal law cooperation as well as the constitutional dimension of citizenship in EU criminal law. It could, perhaps, be argued that the most essential aspect has been of a symbolic nature, i.e., simply recognizing the relevance of citizenship. After all, it could be argued that there was a need to recognize that a system based on enforcement and mutual recognition also needed the other side of the coin, namely substantial principles of non-discrimination and the recognition of citizenship rights.

The European Arrest Warrant (EAW) turned out to be a particularly useful test case.³ Notoriously, the EAW replaced the traditional extradition procedures with ones which secured ‘surrender’ in accordance with the theme of mutual recognition and in which the previous requirement of dual criminality was abolished. The purpose of the EAW was to speed up criminal law cooperation and to fight terrorism more effectively. In short, the EAW litigation saga started with an assumption that mutual trust was the prevailing condition for upholding the legality of the EAW (Rijken 2010; Peers 2015). *Advocaten voor de Wereld* (Case C-303/05) was the first test case of the validity of the EAW that was brought before the Court of Justice. To recap, *Advocaten voor de Wereld* was a non-profit-making association that brought an action in Belgium for the annulment of the EAW Framework Decision. One of the questions asked by the national court⁴ was whether the EAW and its abolition of dual criminality breached the principle of legality in criminal law. This judgment insisted that the underlying idea of the EAW and the rule to abolish the notion of dual criminality did not breach the principle of legality,

1 since the Framework Decision was concerned with procedural law and not with substantive
 2 law. The main reason for such a conclusion was, according to the Court of Justice, the high
 3 degree of trust and solidarity among the member states.

4 As noted above, the area of mutual recognition has been one of the most important playing
 5 fields for the Court of Justice (de Waele 2016). Indeed, much of the EU's cooperation in the
 6 AFSJ has been built on the principle of mutual recognition as underpinning cooperation in
 7 matters of justice and home affairs. Indeed, the concept of mutual recognition constitutes the
 8 main rule-of-thumb in the structure, as provided by the Lisbon Treaty in AFSJ matters, where
 9 'trust' plays an increasingly important role (Moreno-Lax 2012; Costello 2015). It is often sug-
 10 gested that the main problem with mutual recognition in the AFSJ is the absence of sufficient
 11 trust in the AFSJ, and that this is problematic, as Article 67 TFEU presupposes that mutual
 12 recognition plays the key role in this area. Hence, the notion of trust in this area has worked as
 13 a quasi-constitutional standard for justifying EU action.

14 The Court of Justice has used the notion of trust in the area in order to overcome the lack
 15 of uniformity in national systems. For example, in the *NS* case, the Court held that the *raison*
 16 *d'être* of the EU and its creation of an AFSJ, and in particular the Common European Asylum
 17 System, is based on mutual confidence and a presumption of compliance by other member states
 18 and must be in compliance with fundamental rights (C-411/10). The Court set the ball rolling
 19 on mutual recognition of criminal law in the judgment of *Gözütok and Brügge* (C-187/01). The
 20 key provision in this area is Article 54 CISA that set out the fundamentals of *ne bis in idem*. In
 21 *Gözütok and Brügge*, the Court stated that there is a necessary implication that the member states
 22 have mutual trust in their criminal justice systems and that each recognizes the criminal law in
 23 force in other member states even when the outcome of a case would be different if its own
 24 national law were applied.

25 Thus, the mutual recognition of judicial decisions across the member states presupposes a
 26 level of trust between the domestic legal orders that appears particularly difficult to achieve in
 27 an area as sensitive as criminal law. In general, criminal law deals with the deprivation of liberty,
 28 which contrasts with the imperative of the EU's freedom of movement. Furthermore, a common
 29 problem which arises when discussing the notion of EU criminal law cooperation, and as such
 30 one that is frequently highlighted by academic commentary, is that there is no definition of
 31 'mutual trust' in the field of criminal law (Walker 2002). This lack of conceptualization has been
 32 considered a significant *lacuna* in EU criminal law cooperation. In this regard, there is currently
 33 insufficient mutual trust among the member states and no adequate European regime for the
 34 protection of human rights within the former third pillar to justify such an analogy with the
 35 internal market and mutual recognition (Peers 2015). The notion of trust has also played an
 36 important role in the civil law area (Storskrubb 2016). For example, in the case of *Grasser* (Case
 37 C-116/02), in connection with the Lugano Convention, the Court concluded that the hypo-
 38 theses of mutual trust must prevail over conflicting considerations such as when a member state
 39 faces difficulties in dealing with a case effectively.

40 Indeed, several recent cases on the limits of mutual recognition in the AFSJ demonstrate that
 41 the concept of mutual trust is not an absolute requirement, but can be set aside if necessary for
 42 the adequate protection of human rights (Case C-123/08). In the *NS* (Case C-411/10) case
 43 regarding EU asylum law, the Court of Justice asserted that, if there are substantial grounds for
 44 believing that there are systematic flaws in the asylum procedure in the member state responsi-
 45 ble, then the transfer of asylum-seekers to that territory would be incompatible with the Charter
 46 of Fundamental Rights.

47 Furthermore, the recent case of *Stefano Melloni* was concerned with the application of the
 48 principle of mutual recognition to trial *in absentia*. The message of *Melloni*, according to the

recent Opinion 2/13 on the accession to the ECHR, is to protect the supremacy of the EU from divergent (stricter) application of fundamental rights. In Opinion 2/13, the Court held that the principle of mutual trust requires, particularly with regard to the AFSJ, ‘each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law’. Hence, the EU’s accession to the ECHR was seen as potentially weakening the EU enforcement project. This unilateral approach may appear to be a contradictory message against the background of the struggle to achieve better enforcement in criminal law.

Yet, in the recent *Aranyosi and Căldăraru* case (C-404/15 and C-659/15 PPU), concerning the execution of a EAW and the risk of inhumane and degrading treatment, the Court emphasized Article 4 of the Charter of Fundamental Rights that prohibition is absolute in that it is closely linked to respect for human dignity (Gáspár-Szilágyi 2016). The Court held that the executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to exclude the existence of such a risk.

The Court has interwoven the AFSJ and the different areas that it entails. In the project of asylum law, the judgment of *El Dridi* (Case C-61/11) is instructive. Here, the Court held that the principle of proportionality must be complied with when deciding on the return procedure. In this case, the principles of proportionality and effectiveness were relied upon by the CJEU to define the competence and margin of appreciation of member states concerning the coercive measures they can implement in the context of the procedure for the return of illegally staying third-country nationals.⁵ The first principle was employed by the Court to examine the lawfulness of such measures (which include, for example, detention in a facility and deportation) (Case C-61/11). The second principle restricted national competence in the sense that the member state must not prevent the achievement of the objectives of the Return Directive,⁶ with regard to the implementation of an efficient policy of removal and repatriation of irregularly staying third-country nationals. The obligation to ensure compliance with EU law implies that the national court has the power to refuse to apply a custodial sentence which is imposed for the mere reason that the third-country national continues to stay in the territory of the member state after the expiry of the period established for him or her to leave the country.

Moreover, as indicated above in the *NS* case, in the context of the EU asylum system, the Court of Justice asserted that, if there are substantial grounds for believing that there are systematic flaws in the asylum procedure in the member state responsible, then the transfer of asylum-seekers to that territory would be incompatible with the Charter of Fundamental Rights. For the CJEU, there is no doubt that where there is a serious risk that the applicant’s rights, as guaranteed by the Charter of Fundamental Rights, may be breached, member states should enjoy a wide ‘margin of discretion’. This permits the member state in which the application was lodged to examine it even when the criteria set out in Chapter III of the Dublin III Regulation⁷ do not apply, in particular when the state that should be responsible is deemed to be ‘dangerous’. The question is the extent to which this margin of appreciation should operate in light of potential political or ideological conflicts (Fichera and Herlin-Karnell 2013). The Court has yet to respond to this question.

Cooperation with other courts?

The EU Court has to ensure consistency between the rights under the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR).⁸ This means that it often looks at the case law of the Strasbourg Court for guidance.

For example, prior to the *NS* case discussed above, in 2011, the European Court of Human Rights, in the case *M.S.S. vs. Belgium and Greece*, held that the conditions of detention and the living conditions of asylum-seekers in Greece were to be regarded as a violation of Article 3 of the ECHR (Leczykiewicz 2016).⁹ Likewise, in the area of EU criminal law, the Court ‘copies’ the ECHR with regard to the minimum standard adopted, which was both the case in *Melloni* (Case C-399/11) (the ECHR does not give a wider protection, but leaves it often to the margin of appreciation test whether to allow trial *in absentia*) and in *Aranyosi and Căldăraru* (Cases C-404/15 and C-659/15 PPU) (on the prohibition of degrading treatment). In spite of this, the Court of Justice continues to conduct a rather complicated relationship with Strasbourg, and the European Convention on Human Rights in particular. In its recent Opinion 2/13 on the EU’s accession to the ECHR, the Court of Justice rejected the possibility of EU accession to the ECHR partly on the grounds that as ‘EU law imposes an obligation of mutual trust between those Member States, accession is liable to [...] undermine the autonomy of EU law’ (Halberstam 2015).

The Court has adopted a ‘yo-yo’-like approach with regard to its relationship with national courts. Sometimes the Court has maintained its *Solange* doctrine, and at other times it has simply focused on the enforcement of EU law at all costs. The case law, if you like, is contextualized, albeit sometimes a little unclearly, as to why some cases are different from others. Apart from the importance of consistency as a value in shaping legal drafting, and as such a prominent theme in the case law of the Court of Justice, consistency theoretically plays an important part in judicial decision-making (Levenbook 1984). In Opinion 2/13 the Court held that:

In so far as the ECHR would require a EU Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession [to the ECHR] is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

Regarding the relationship between the Court of Justice and the European Convention Court, the ECtHR’s case law has been rather more solicitous of asylum-seekers’ fundamental rights, as in *M.S.S. vs. Belgium and Greece* mentioned above. According to Halberstam (2015), by asking for an express exemption for member states’ Convention violations caused by EU law’s mutual confidence obligations, the EU Court is trying to mimic the existence of a federal state in international law. On the other hand, cases such as *Kadi* confirm that the Court of Justice sometimes gives more protection than does the ECtHR. A challenge for the EU Court of Justice is then to convince the highest national courts that, despite the non-accession, the EU system of rights is, at a minimum, as good as that offered by the ECHR. In a recent article, Anneli Albi (2015) has argued that what is really needed in AFSJ matters (and, more generally, in EU constitutional law) is a turn to ‘substantive co-operative constitutionalism’. By this, she means that the Court needs to adopt a conceptual approach through which scholars, courts, and national and transnational institutions would be able to explore how to develop European and global governance in a way that would seek to uphold and enhance the achieved standards of the classic, substantive, more ‘guarantistic’ and democratically responsive version of constitutionalism. Clearly, this is work in progress. It is also an area in which the Court of Justice is likely to continue to be a game-changer in the future, with either more cooperation on the table or by promoting a ‘closed-door’ approach. What, then, does all this tell us about the Court at the apex of AFSJ integration?

The Court of Justice as a trustee court in the area of freedom, security and justice?

Arguably, the Court considers itself to be not only at the top of the judicial integration chain, but also as a court with fiduciary obligations to protect rights ensured by EU law in all member states via its extensive case law on trust in the autonomous European legal order.

Therefore, according to Alec Stone Sweet and Thomas Brunell (2013), the Court of Justice is not a simple agent of the member states, but instead it is the latter that are the trustees of its regimes, i.e., of EU law at large (Criddle and Fox-Decent 2016). In reaching this conclusion, the authors mention three criteria. First, that the Court is recognized as the authoritative interpreter of the regime's law, which is the case of the EU Court of Justice. Second, that the Court's jurisdiction with regard to state compliance is compulsory. Third, that it is virtually impossible, in practice, for contracting states to reverse the Court's important rulings on treaty law. A trustee court is a kind of 'super-agent', empowered to enforce the law against the member states themselves.

Does this description then fit the Court of Justice with regard to the AFSJ? A tentative expression of trusteeship may be found in the AFSJ where the Court has to balance freedom, security and justice. An example of the Court of Justice acting as a successful guardian of the AFSJ can, perhaps, be found in the recent case of *Digital Rights* (Case C-293/12), which is instructive as a touchstone of justice-inspired reasoning in the European Court. The Court annulled the 2006 Data Retention Directive, which was aimed at fighting crime and terrorism, and which allowed data to be stored for up to two years. It concluded that the measure breached proportionality on the grounds that the Directive had a too sweeping generality and therefore violated, *inter alia*, the basic right of data protection as set out in Article 8 of the Charter of Fundamental Rights. The Court pointed out that access by the competent national authorities to the data retained was not made dependent on a prior review carried out by a court or by an independent administrative body whose decision sought to limit access to the data to what was strictly necessary for the purpose of attaining the objective pursued. Nor did it lay down a specific obligation on member states designed to establish such limits. According to the Court, there was not a sufficiently good enough justification provided by the EU legislator.

Subsequently, in *Schrems* (C-362/14 *Schrems vs. Data Protection Commissioner*), the Court ruled, in effect, that US law allows US intelligence services to access the personal data of EU citizens without sufficient privacy safeguards as a matter of EU law. The EU law in question was the so-called Commission 'Adequacy Decision' 2000/520, adopted pursuant to Article 25 of the Data Protection Directive 95/46. Under Directive 95/46, the transfer of personal data outside the European Economic Area to a third country is only permissible when the third country de facto ensures an 'adequate level of protection'. The Commission may find that a third country meets this standard through its domestic law or international commitments, and by taking into account all of the circumstances surrounding the data transfer. The Court declared the Adequacy Decision invalid. It did so 'without there being any need to examine the content of the safe harbour principles' (Fletcher and Herlin-Karnell 2016) on the basis that the Commission had not stated in the Adequacy Decision that the United States did, in fact, 'ensure' an adequate level of protection through its domestic law or its international commitments. This approach was confirmed in the recent *Telia 2 Sverige* (Joined Cases C-203/15 and C-698/15) case concerning the retention of traffic and location of data in relation to subscribers and registered users, which was in breach of the Charter. The Swedish Post and Telecom Authority required Telia 2 to retain traffic and location data in relation to its subscribers and registered users. The measure was disproportionate and in breach of data protection (pars 95–96 of the judgment).

Another example of the Court's active reading of fundamental rights, and therefore an attempted trusteeship, may arguably be found in the case of *Åkerberg Fransson* concerning the compatibility with the *ne bis in idem* principle of a national system involving two separate sets of proceedings to penalize the same wrongful conduct (Case C-617/10). I think this is not just a case about extending the reach of the Charter, but one of genuine concern about the individual. The Court of Justice adopted a very broad reading of the Charter. It held that, although the national rules in question did not, *stricto sensu*, involve any implementation, it was clear from Article 325 TFEU that the member states are required to fight fraud against the EU and thereby supply the same level of penalties for EU and domestic fraud respectively. Moreover, the Court observed that EU law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement, made clear by the text of the Charter or the case law relating to it. According to the Court, such an interpretation would withhold from the national court the power to assess fully whether that provision in question was compatible with the Charter (par. 48).

As seen above, the idea of 'balancing mechanisms' of state action has for a long time been a touchstone for the EU and, as such, has been elevated to a golden rule in EU lawmaking in terms of the proportionality principle. At a minimum, it has always been a key message of the European Court of Justice's case law, and its insistence on proportionality has functioned as a way of either preventing member states from derogating from EU law obligations or, by contrast, of granting them some leeway when asked to enforce supranational EU principles in the national arena. Thus, the potential for the Court to act as a trustee court could arguably be found in an ambitious reading of the proportionality principle, and one such avenue, if read in the light of the fundamental rights, may be seen as being safeguarded by the Charter of Fundamental Rights.

Avenues for future research

The AFSJ era has only just begun and is no longer viewed in isolation from the rest of the EU acquis, but should instead be viewed holistically, without denying the special features of AFSJ law. The creation of trust is a long-term, fundamental project for the EU and the Court plays a key role in pinning down what is precisely meant by it, and clarifying when this notion can be rebutted. For obvious reasons, the refugee and Schengen crises of 2015/2016, along with the increased terrorist threat, the long-standing financial crisis and the consequences of Brexit, will all be challenges for the construction of the AFSJ and its monitoring by the Court of Justice. Clearly, with the UK actually leaving, the opt-out issue from the AFSJ still remains, but the UK relationship will be a challenge. Ireland and Denmark have negotiated a unique approach to the AFSJ project via opt-outs. This poses challenges not only for those trying to analyze the current state of play, but also for national courts, as well as for the Court of Justice, when applying the constitutional principles of the EU.

As is evident from the case law on mutual recognition in the AFSJ, such as the European Arrest Warrant, the Court of Justice has been highly experimental. Although the progress has been slow in many respects, it is nonetheless a Court that has a lot to offer, as it has the toolkit to achieve this aim. Still a great challenge for the Court of Justice in the future is the external dimension of the AFSJ and the growing importance of agencies in decision-making, since they are generally excluded from the Court's jurisdiction. As the Commission has put it: 'Steps taken to ensure freedom, security and justice in Europe are also influenced by events and developments outside the EU.'¹⁰ In other words, the external agenda shapes the internal agenda and is likely to remain a burning issue for the future of AFSJ law. The AFSJ is not immune from the

global landscape and societal setting. As a result of current non-accession to the ECHR, the unified level of human rights protection is likely to remain a key task for the Court of Justice when developing the AFSJ further and maintaining a robust level of fundamental rights protection in Europe. Likewise, an interesting avenue for future research is the potential for the Court to act as a trustee court as well as the implications of a proportionality test and the notion of solidarity in this area.

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Notes

- 1 The Court will not have the power to review the validity or proportionality of operations carried out by the police or other law enforcement agencies of a member state or the exercise of responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security. This limitation seems rather artificial and begs the question of to what extent this treaty-based limitation will be fulfilled in practice.
- 2 COM (2014) 158 final, Communication from the Commission. A new EU framework to strengthen the rule of law.
- 3 Council Framework Decision 2002/584/JHA of June 13, 2002 on the European arrest warrant and the surrender procedures between member states [2002] OJ L 190/1.
- 4 The other questions asked were whether the EAW should have been adopted as a Convention rather than as a Framework Decision and whether the EAW breached the principles of equality and non-discrimination.
- 5 See in this regard points 13 and 16 Preamble and Article 8 (4) of the Directive 2008/115/EC of the European Parliament and of the Council of December 16, 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, OJ L 348 24.12.2008.
- 6 Directive 2008/115/EC *supra*.
- 7 Dublin Regulation No. 604/2013.
- 8 See, in particular, Charter of Fundamental Rights of the European Union [2000] OJ C364/01, Article 52(3):
In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
- 9 Article 3 ECHR: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'
- 10 'An open and secure Europe: making it happen', COM (2014) 154 final and A European Agenda on Security COM(2015) 185 final.

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